Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

TAWOOS BAZARGANI,

*Petitioner,*

*v.*

HAVERFORD STATE HOSPITAL,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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86 pp

## QUESTIONS PRESENTED

1. Whether the opinion below departed from the accepted and usual course of judicial proceedings and were in violation of litigant's due process right by ignoring the defendants false statements under penalty of perjury which constituted the defendants major defenses about their retaliatory and discriminatory dismissal and non selection for promotion.

2. Whether Eleventh Amendment bars a private suit in the federal court against the defendants who have committed a false statement under penalty of perjury which is direct violation of Title 18 U.S.C.A. § 1623(a).

3. Whether claim preclusion as well as the issue preclusion can be implemented to the plaintiff's legal record which has not been reviewed by the state administrative where it had been filed. Whether does claim preclusion effect a claim which was filed next to the prior judicial proceedings, such as, perjury and forgery claim (*Bazargani v. Glazman*) which was filed in October 2000, and the impact of such a claim upon the petitioner's instant Title VII complaint.

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## OPINIONS BELOW

The court of appeals entered its judgment on April 12, 2002, for the case No. 00-1390 and the memorandum and opinion of the case are attached and the deadline date for filing the petition for the writ of certiorari was July 11, 2002. A motion to extend the deadline date for filing the certiorari was filed on June 28, 2002. The motion was granted on July 8, 2002, and the deadline date for filing the certiorari was extended to on or before September 9, 2002.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 12, 2002. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND RULES INVOLVED

United States Code Annotated title 18, section 1623(a) any person under oath or in any declaration, certificate, verification in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration shall be fined. U.S.C.A. title 18 section 1623(e). Proof beyond a reasonable doubt is sufficient for conviction (Section 1623 of the above title is reprinted in the App. C).

Pennsylvania Consolidated Statutes Annotated, title 18 section 4904(a)(1) "misleading any public servant by a falsified statement is misdemeanor of a second degree." P.C.S.A. title 18 section 4904(b) "A person commits a misdemeanor of third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notive, authorized by law, to the effect that false statement made there in are punishable." (section 4904 of title 18 is reprinted in App. C).

Federal Rule of Civil Procedure, Rule 132.03[1] Issue preclusion does not apply unless the issue to be precluded in the subsequent action was actually litigated; Rule 132.03[2][a] "For issue preclusion to apply the issue must have actually been litigated." Federal Rule of Civil Procedure, Rules 131.22 and 131.22[1] if such facts in *themselves* establish independent grounds for a claim against the defendants in the previous action, claim preclusion does not apply, even if the new claims are based on the same legal theories or seek the same damages as the prior action. Clam preclusion doctrine does not apply to actions based on different claim. Federal Rule of Civil Procedure, Rule 123.40[3][a] and 123.40[3] "This rule . . . operates as an exception to the general rule of sovereign immunity that states may only be sued with their consent."

## STATEMENT OF THE CASE

**Procedural History: The petitioner/appellant**

("The Doctor") despite the physician's union agreement (PASMHP), provision regarding seniority, and despite the hospital's its own routine has been passed over for promotion, as the most senior psychiatrist, twice, first in 1992 when there was not a single ill report about the Doctor's patient care. Then a physician with much less seniority and just employed (Dr. L. Glazman) was promoted (Dr. Glazman belonged to the same religious, ethnic group as of Dr. M. Marcovici, assistant superintendent for clinical services, who had been conducting the promotion matter) (*see* attached Lodging pp. 14-19). In June 1993 the Doctor filed a Title VII complaint in Philadelphia Equal Employment Opportunity Commission ("E.E.O.C.") (*see* Lodging, p. 13) after she was passed over for promotion. The hospital retaliated against by assigning the Doctor to work with the sickest patients and Dr. Glazman, recently employed and promoted physician, was assigned to



supervise the Doctor. In 1994 the Doctor was passed over for promotion for the second time when the promotion process was repeated for the same position. First the promotion processed in June when the Doctor did not apply because of the hospital's non compliance with the posting policy then the hospital as its routine simply promoted the second most senior psychiatrist (Dr. S. Sakheran). The promotion process had to be repeated because of the hospital's non compliance with posting policy. The position was posted for applications in October 1994 when the Doctor also applied but parallel to this application an allegation, for the first time in the Doctor's working history, was written by Dr. Glazman, her new supervisor, against the Doctor's patient care (*see* exhibits from the instant brief, attached Lodging pp. 20-22). On November 21, 1994, the Doctor filed and served Title VII complaint in federal court (*see* certified record of this complaint, attached Lodging pp. 1-12). Three days past filing on November 23, 1994, the Doctor's employment was suspended because of allegation and because of being delusional, without legally required mental examination to substantiate such a diagnosis, the Doctor has never had a history of mental disorder or mental treatment when ever what ever. On November 30, 1994, the Doctor following an official mental examination, which declared the Doctor to be free of any mental disorder returned to duty, and the same day Dr. Z. Fernandes was promoted to the posted position (*see* Lodging, pp. 23-28 & 35). The Doctor resumed her previous duty and functioned very much as routine until the second suspension. The cause for second suspension, despite the official mental examination reported nine (9) days before the suspension, which declared the Doctor free of any mental disorder, was again insanity and allegation, the Doctor was accused of being dangerous to self and others, the main legal cause for the patients' involuntary admissions in to a mental facility, not surprisingly, Dr. M. Marcovici, psychiatrist, took no action to protect the Doctor and her

patients from danger and four (4) weeks past the filing Title VII complaint the Doctor's employment was terminated after seventeen years dedicated service (*see* Lodging, pp. 29-35). In termination letter the Doctor was accused about the treatment of four (4) of her patients. Two pre-disciplinary conferences were held to discuss the charges written in allegations where the Doctor's attorney was banned to join the conference despite the Doctor's legal entitlement, this legal entitlement was verified with the physician's union's attorney before to hire the attorney. The Doctor sufficiently defended herself by substantiating the facts that the Doctor's patient's treatment had been supervised by Dr. Glazman and the fact that the implemented treatment remained within the hospital's policies and procedures. In January 1995, the Doctor appealed both her termination and her non selection for promotion. Two days hearing was held for termination during which the hospital paid two private psychiatrists who argued the Doctor's patient care independent of the hospital's policies and procedures and the Doctor's defenses argued during the pre-disciplinary conferences has never been rebutted. The charges for two out of four patients were dismissed because the hospital could not substantiate the causes for its accusations (*see* App. B, p. 26, n.15) and for the charges of two other patients, which was the treatment with medicine "Lithium", the hospital could only prevail by committing perjury while under oath consequently a perjury and forgery charges was filed against the Doctor's Supervisor in Philadelphia District Attorney Office (*see* Lodging, pp. 63-73) (*Bazargani v. Glazman*). The complaint for non selection for promotion which was filed in State Civil Service Commission ("S.C.S.C.") was continued for seven times mainly upon the request of the hospital (*see* Lodging pp. 36 & 55-57). In April 2000, the Doctor motioned for examination of commissioner's impartiality and requested for continuation of the hearing which was scheduled on May 4, 2000, (for the cause for this motion see attached copy of the motion,



Lodging pp. 58-61 and exhibits related to the motion Lodging pp. 42-54). The commissioner denied the motion, the Doctor for second time requested for the continuation of the hearing where she informed the commissioner that her denial of the Doctor's motion for the impartiality was appealed (*See* Lodging pp. 40-41). The commissioner ignored the Doctor's appeal and held a hearing on May 4, 2000, for non selection for promotion before to inform the Doctor of the denial of her request for continuation and dismissed the claim in the absence of the Doctor (*See* Lodging pp. 36-39, the exhibits form the instant briefs). The action of the Title VII lawsuit failed on November 21, 1994, was dismissed by the Doctor after the second Title VII claim was filed by the Console's firm, then it was mutually agreed that the action will be dismissed as of right, with stipulation and therefore the case had not bee proceeded to the trial, as is documented in the docket entry. On September 26, 1995, the Doctor's then-attorney provided the Doctor with a copy of agreement of dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(ii) (*see* Lodging, p. 12). On September 28, 1995, attorneys of both parties hand in hand with the hospital, while in a hearing in the honorable Harvey Bartle's chamber, in the absence of the Doctor and absolutely out of the Doctor's awareness, while under the oath, they did not say the truth that, the case had not been proceeded to the trial, while under the oath, they did not say the truth that there was mutual agreement to withdraw the action under Rule 41(a)(1)(ii), while under the oath they pretended their readiness to select the jury which was nothing but a facade and they withdrew the action of the case under rule 41(a)(2) (*see* Lodging, pp. 1-11). The Doctor discovered this fraud on the court in year 2001, when the Doctor was preparing a brief, as pro se, for the second Title VII claim which was dismissed by granting the hospital's summary judgment without having a hearing for the Doctor's complaint for non selection for promotion which was one of the main cause. Then the Doctor motioned to reopen the first

Title VII claim which was denied by the district judge. The denial has been appealed to the Third Circuit the briefs were submitted for the review on June 25, 2002 without oral argument and the appeal is pending the judgment (case no. 01-4315).

## STATEMENT OF FACTS

1. In Title VII claim the Doctor complained of being passed over for promotion because of the hospital's retaliatory, discriminatory behavior, the hospital defended this claim by a false declaration "under penalty" the following are from the hospital's superintendent's (Aidan Altenor Phd.) affidavit (Paragraphs Nos. 1, 12 and 21) [Att. 10, exh. D, of defendant's summary judgment (the instant case)]

> 1. I Aidan Altenor Phd. declare under penalty of perjury that the following facts are true and correct, based upon my own knowledge; 12. I categorically deny that Dr. Bazargani's (petitioner) national origin or religion had anything . . . to select Dr. Fernandes, rather than Dr. Bazargani . . . in November 1994 . . . I did not know and I do not know their respective religions background; 21. I have read the forgoing and declare, under penalty of perjury, that the facts recited are true and correct.

The fact is that the Doctor's nationality and her religion have distinctly been documented in the Title VII complaint which was filed and served on the hospital's administration (including Aidan Altenor Phd.) on November 21,1994, nine days before to promote Dr. Fernandes (certified record of this complaint is attached, *see* Lodging pp. 1-11), the Doctor's religion as well as her nationality have also been documented in the second paragraph of E.E.O.C's report to the hospital's superintendent (Aidan Altenor Phd.) [*see* Att. 9, defendant's summary judgment of the instant case ("the summary



judgment")], this report was forwarded to superintendent on August 24,1994, and Dr. Fernandes was promoted on November 30,1994 (*see* attached Lodging, p. 35, exhibits from the instant briefs). These have been documented with further detail in the instant Appellant Reply Brief. Pursuant to United Stated Code Annotated ("U.S.C.A.") title 18, section 1623(a) any person under oath or in any declaration, certificate, verification in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration shall be fined. Pursuant to U.S.C.A. title 18, section 1623(e) "proof beyond a reasonable doubt under this section is sufficient for conviction (the related documents are reprinted in appendix C). Pursuant to Pennsylvania Consolidated Statutes Annotated ('P.C.S.A.') title 18, section 4904(a)(1)" misleading any public servant by a falsified statement is a misdemeanor of a second degree. P.C.S.A. title 18, section 4904(b) "A person commits a misdemeanor of third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable." ( the related documents are reprinted in Appendix C). *See* C.A.6 (Ky. 1998) "Defendant may be find guilty of perjury if jury could find beyond reasonable doubt from evidence presented that defendant knew what question meant and gave knowingly untruthful and materially misleading answers in response ." 18 U.S.C.A. § 1621. *United States v. DeZarn*, 157 F.3d 1042, 1998 Fed. App. 309p.; *see* C.A.7 (Wis. 1999) "For purpose of false swearing statute, material statement is one that has a natural tendency to influence, or is capable of influencing, the decision of the decision-maker to which it was addressed." 18 U.S.C.A. section 1623(a). *United States v. Gellene*, 182 F.3d 578 *rehearing denied*; *see* M.D. Pa. 1998. "In perjury context, grand jury testimony need not directly concern element of crime for which grand jury may indict for it to be

material to grand jury proceeding." *Their v. United States*, 31 F. Supp. 2d 424. Consequently Third circuit decision has departed from the accepted and usual course of judicial proceedings and has been in conflict with decision of other circuits as well as in conflict with this court's prior rulings on the essential U.S.C.A Title 18, section 1623 false declarations before court.

2. As it was detailed in the above Procedural History the Doctor filed and served Title VII complaint on November 21, 1994. A copy of the certified record of this complaint is attached (*see* Lodging, pp. 1-11). *See* verification attached to the complaint where the Doctor's then attorney has certified that the copies of this complaint were served on the hospital's administration on November 21, 1994, see certificate of services where the attorney has certified that the copies of the complaint were served on M. Marcovici, M.D. and Aidan Altenor Phd. on November 21,1994. The hospital retaliated against this complaint by suspending the Doctor's employment three (3) days past the filing and then suspending again shortly after and terminating the Doctor's employment by four (4) weeks past filing on December 22, 1994 (*see* attached Lodging, pp. 23-34). In the defendants' summary judgment M. Marcovici, M.D. and the superintendents' only defense against such a clear, convincing harsh retaliation was a false declaration under penalty for perjury during which they patently denied and said that while suspending and dismissing in November 1994, that they did not know that the Doctor had filed the complaint on November 21, 1994 and that they only knew that the Doctor had filed Title VII complaint in E.E.O.C. in June 1993. The following is from the summary judgment (pp. 36-37) The Third Circuit has specifically stated "the mere fact that adverse employment action occur after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events only if



the timing of the alleged retaliation action is "unusually suggestive" of retaliatory motive can a causal link possibly be inferred. *Id*. Two days between notification of an employee's protected conduct and the employee's discharge would be "unusually suggestive" *see Jalil*, 873 F.2d at 708, but a 19 months lag is not in the instant case approximately 18 months passed between when the hospital received a copy of plaintiff's first E.E.O.C. charges and the effective date of her termination. This is not "unusually suggestive". U.S.C.A. 18, section 1623 and P.C.S.A. 18, section 4904 are detailed above (*see* No. 1, sec. II and are reprinted in Appendix C). *See* C.A. 8 (Iowa) 2000. "False statement made by defendant was not immaterial in perjury prosecution" *United States v. Plumley*, 207 F.3d 1086, *rehearing denied*; *see Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 557 Pa. 166 (Pa. 1999). The hospital's patent denial about the service of Title VII complaint has been documented in detail in the Arguments of instant appellant brief and reply brief and has been supported by clear, convincing evidence, *see* certified record of VII complaint (attached Lodging pp. 1-11). Consequently the Third Circuit's ruling has departed from the accepted and usual course of judicial proceedings and has been in conflict with the previous rulings of this court as well as of other circuits and in conflict with the Third Circuit's own rulings, on the essential U.S.C.A. Title 18, section 1623, false declaration before the court.

3. The following paragraphs are from Third Circuit's Opinion of the instant case in reference to the doctrine of preclusion (this is reprinted at App. A, *see* respectively p. 7, 2nd parag. & p. 9, footnote) Bazargani (petitioner) argued in the District Court as well as at great length on appeal to this Court, that Haverford did not have just cause to terminate her employment because she did not violate hospital policies and procedures. We agree with the District Court that the doctrine of issue preclusion bars re-litigation of this issue.

Issue preclusion bars re-litigation of an issue identical to that in a prior action; "In addition we agree with the District Court that even if Bazargani had presented sufficient evidence of her termination and retaliation by termination claims to proceed to trial, the claims are nonetheless barred by doctrine of claim preclusion." The following statement is from memorandum of the District Judge (*see* App. B, p. 36, 1st. Para.) "Plaintiff responds by asserting that her claims of religious and national origin discrimination and retaliation are not barred by *issue* Preclusion . . . plaintiff disregards . . . that *claim* preclusion, and not *issue* preclusion, is the applicable." The Third Circuit's ruling of the doctrine of claim preclusion have departed from the accepted and usual course of judicial proceedings for the following reasons:

A. The Doctor passed over for promotion twice and the Doctor's first Title VII complaint was filed consequent to the first non-selection for promotion ("non-selection") (*see* enclosed Lodging, p. 13). Also in 1994 the Doctor again was passed over for promotion and in January 1995 the Doctor filed the complaint for non-selection (for detail documentation see above Procedural History). The hospital's behavior involving the Doctor's non-selection has demonstrated noticeable inconsistencies, implausibilities and contradictions which are indicative of the hospital's retaliatory and discriminatory behavior against the Doctor. The Doctor's non-selection complaint has never been heard, see District judge's statement in his memorandum (Memo. is reprinted in App. B, *see* p. 45, n.4), As it has been detailed in the instant appellant briefs, indeed the District Judge's judgment of the Doctor's second Title VII claim, in reference to non selection, has been merely based upon a few statements written by the hospital in the Summary judgment, in that, the hospital has totally avoided any discussion about non selection of the year 1992 which has led to the filing of first Title VII complaint in November



1994 the briefs of which has been pending the judgment in Third Circuit. When the Third Circuit issued its Opinion the Doctor's non selection complaint was dismissed in the absence of the Doctor. The non-selection complaint was filed in State Civil Service Commission ("S.C.S.C."). In April 2000, the Doctor motioned for examination of the commissioner's impartiality (for the cause see the attached copy of the motion, Lodging, pp. 58-61 & 42-54) and requested for continuation of the hearing for non-selection claim. The commissioner denied the motion (*see* Lodging, p. 62). Then the Doctor for the second time requested for continuation of the hearing where the Doctor informed the commissioner that the reason for request is that the commissioner's Order denying the motion for examination of impartiality was being appealed (*see* Lodging pp. 40-41) The commissioner ignored the Doctor's appeal and held a hearing before to inform the Doctor about the denial of her second request for continuation and dismissed the non-selection complaint in the absence of the Doctor (*see* Lodging pp. 37-38 & 36, exhs from the instant brief), for further information in this regard see the Procedural History. Consequently, the Third Circuit has departed from the accepted and usual course of judicial proceedings because: "unreviewed state administrative proceedings do not have preclusive effect (the claim preclusion) on Title VII claims" *see University of Tennessee v. Elliot*, 478 U.S. 788, 796 (1986).

Because the Doctor has never had a hearing for his Title VII complaint consequently the issue preclusion can not be implemented. Pursuant to Fed. R. Civ. P. 132.03[1] Issue preclusion does not apply unless the issue to be precluded in the subsequent action was actually litigated and decided in the prior action. Fed. R. Civ. P. 132.03[2][a] "For issue preclusion to apply, the issue must have actually been litigated." *See Liberty Mut. Ins., Co. v. K.A.T., Inc.*,

855 F. Supp. 980, 985 (N.D. Ind. 1994) "prior case held only that insured had to resort to administrative remedies not insurer"; *see Owens v. New York City Hous. Auth.*, 934 F.2d 405, 409 (2d Cir.), *cert. denied*, 502 U.S. 964 (1991). Because the Doctor has never had a hearing for Title VII complaint therefore the issue preclusion is not applicable.

B. Amendment XIV, Section 1, Note 891 "due process may be provided by predeprivation process or by postdeprivation remedies, or by some combination thereof." *Fox Fuel, a Div. of Keroscene, Inc. v. Delaware County Schools Joint Purchasing Bd.*, E.D. Pa. 1994, 756 F. Supp. 945; Amendment XIV, Section 1, Note 890, "Due process clause is concerned not only with actual bias of judges and jurors, but also with appearance of justice." *See Exxon Corp. v. Heinz*, C.A. 9 (Alaska) 1994, 32 F.2d 1399. Hearing must be held before impartial tribunal to meet due process requirement of opportunity to be heard "at a meaningful time and in a meaningful manner." *R.L. Augustine Const. Co., Inc. v. Peoria Unified School Dist. No. 11*, Ariz. App. Div. 1 1995, 904 P.2d 426, 183 Ariz. 393, *review granted, vacated*, 936 P.2d 554, 188 Ariz. 368, corrected. Amendment XIV, Section 1, Note 1040 "when state provided means of appeal it can not put limitation on it which are discriminatory, arbitrary," *Nebraska State Bank v. Dudley*, 1979, 278 N.W.2d 334, 203 Neb. 226, *appeal dismissed*, 100 S. Ct. 24, 444 U.S. 804, 62 L. Ed. 2d 17. Consequently, the District Judge has deprived the Doctor from her due process rights by granting defendants' summary judgment without having a hearing for non-selection complaint. The commissioner by ignoring the Doctor's appeal of the commissioner's Order, denying the Doctor's motion for examination of the commissioner's impartiality, and having a hearing for non-selection complaint before to inform the Doctor about refusal of the Doctor's request for continuation, despite the appeal, has deprived the Doctor strongly from her due process rights.



The commissioner as well as the District Court were patently in violation of Amendment XIV. The Third Circuit by affirming the lower courts' decision has significantly eroded the scope and operation of the Fourteen Amendment of the United States constitution. Consequently the Third Circuit conflicts with this court's prior rulings on the essential due process right of a litigant to a competent and impartial trier of fact. The review of this court becomes important in serving the justice on the behalf of the Doctor as a member of her own community and her class of religion.

4. Fed. R. Civ. P. 123.40[3][a]

> by violating the federal constitutional rights of citizens, state officials . . . may be sued personally for the consequences of their unconstitutional conduct. This legal fiction is necessary to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of federal law. This rule is referred to as doctrine of *Ex Parte Young*. The *Ex-Parte Young* doctrine operates as an exception to the general rule sovereign immunity that state may only be sued with their consent . . . The Supreme Court has affirmed the validity of the *Ex Parte Young* doctrine.

Fed. R. Civ. P. 123.40[4][b][i] "A federal suit seeking damages against a state officer in an individual capacity, . . . the Eleven Amendment does not protect officer against such a suit. Although subjecting state officers to personal liability may hinder the performance of their public duties, the Eleventh Amendment is not a bar to the suit." *See Russell v. Dunston*, 896 F.2d 664, 667-668 (2d Cir. 1990); *see Doe v. Lawrence Livermore Nat'l Labor*, 131 F.3d 836, 838-839 (9th Cir. 1997); *see Papasan v. Allain*, 478 U.S. 265 279-282,

106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (ongoing adjustment of benefits from state-held assets deemed prospective). Consequently the Third Circuit ruling that Eleven Amendment bars the Doctor to suit the hospital's administrations in the federal court is in conflict with the rulings of similar cases of the other U.S. appellate courts as well as in conflict with the U.S. federal laws.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT WHEN DEFENDANTS HAVE COMMITTED FALSE STATEMENTS UNDER PENALTY OF PERJURY.

A physician who belongs to a society of a ethnic, religion which is Protected by Title VII of Civil Rights of 1964 as amended, 42 U.S.C. § 2000e, *et seq*. has been badly discriminated and retaliated against her religion and nationality, the above Procedural history is self explanatory and speaks for itself. The physician has turned to judiciary system for justice. The intervention of this court becomes necessary in establishing the service of justice on the behalf of the victim, who represents, as a member, her own class of religion. Federal Rule of Civil Procedure, Rule 123.40[3][a] "This . . . is necessary to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of federal law."; Rule 123.40[3][e] "is the result of the court's effort to harmonize . . . with federal supremacy reflected in the constitution and federal laws." The followings are the reasons for the petition:



1. The petitioner/appellant Tawoos Bazargani, M.D. ("the Doctor") has been employed by Haverford State Hospital ("the hospital") for seventeen (17) years where she has badly been discriminated against. The above Procedural History reprinted here is an unopposed history from the appellant briefs of the instant case and is self explanatory and speaks for itself. Consequently the Doctor had, on November 21, 1994, filed and served a Title VII complaint against the hospital's discriminatory and retaliatory behavior against the Doctor after the Doctor was unjustifiably passed over for promotion in 1992. The complaint which was also served on the hospital's superintendent (Aidan Altenor Phd.) nine days before not selecting the Doctor for promotion (November 30, 1994) distinctly identified the Doctor's religion and nationality. The Doctor's religion and nationality were also documented distinctly in Equal Employment Opportunity commission's report to the superintendent which was reported a few weeks prior to not selecting for promotion. The hospital's superintendent's defenses, in its entire entity, in reference to his claim, that he did not know the Doctor's religion when not selecting the Doctor for promotion on November 30, 1994, and that he was not retaliatory and discriminatory as documented in his affidavit, was not truth in its entire entity and subject to title 18 U.S.C.A. §§ 1623(a) and 1623(b) "False declaration before grand jury or court" (a copy of the 18 U.S.C.A. is reprinted in Appendix C), The falsity of these statements were supported by clear, convincing evidences. For further documentation in this regard see above Statement of the Case. Such a penalty codified by Pennsylvania Consolidated Statutes Annotated "P.C.S.A." title 18 section 4904(a)(1) and Section 4904(b) (a copy is reprinted in Appendix C). The Third Circuit has departed from the accepted and usual course of judicial proceedings by its full ignorance of the hospital's administration's false statement despite the Doctor's detail documentation. Third Circuit has also departed from the

accepted and the usual course of judicial proceedings by ignoring that the hospital's administration were subject to the penalty of false declaration before the court. *See* C.A. 3 (Pa.) 2000. "prosecutor questions . . . were unambiguous and therefore were sufficient to form basis for subsequent perjury indictment. 18 U.S.C.A. § 1623 — *United States v. Sarafini*, 233 F.3d 1149; *see* C.A. 10 (Okla.) 1998," Elements of crime, under Organized Crime Control Act, of making false declaration consist of testimony which is (1) given under oath, (2) false in one or more respects, (3) knowingly and willfully given and (4) material. 18 U.S.C.A. § 1623(a), *United States v. Farmer*, 137 F.3d 1265; *see United States v. Weller*, 238 F.3d 1215 (Kan. 2001).

2. Furthermore, the hospital's administration's (Mia Marcovici, M.D. and Aidan Altenor Phd) had patently denied about the hospital's strong retaliatory and discriminatory behavior against the Doctor and had claimed that when suspending the Doctor's employment three (3) days past filing and serving title VII complaint and terminating the Doctor's employment three (3) weeks past the filing after seventeen (17) years dedicated service that they did not know that the Doctor had filed title VII complaint on November 21, 1994, *see* the complaint's verification where distinctly says the complaint were served on Dr. Marcovici and Dr. Altenor on November 21,1994, see the certificate of services. The Third Circuit has ignored such a patent denial only by raising question that the court material where the filing and the service of title VII complaint were documented were not court certified. Please find enclosed certified copy of title VII complaint which was filed and served (*see* enclosed Lodging p. 3-11) three (3) days before suspending the Doctor's employment. Consequently, the Third Circuit ruling is in direct contradiction of the ruling of other circuit courts in the similar cases. *See* C.A.7 (Ill.) 2000. "Evidence as to falsity and materiality was sufficient to sustain conviction



for perjury arising from statements defendant made" *Neal v. United States*, 121 S. Ct. 485, 148 L. Ed. 2d 458, *cert. denied*, 121 S. Ct. 1131, 148 L. Ed. 2d 997, *on remand*, 2001 WL 301212, *post conviction relief denied*, 2001 WL 914471; *see* C.A. 1 (Mass.) 2000. "perjury conviction was sufficiently supported by evidence" — *United States v. Kenrick*, 221 F.3d 19, *cert. denied*, 121 S. Ct. 387, 531 U.S. 961, 148 L. Ed. 2d 299, *cert. denied*, *Ober v. United States*, 121 S. Ct. 639, 148 L. Ed. 545; *see* C.A. 2 (N.Y.) 2000. "A statement can be false without being uttered with the scienter required to render it perjurious." *Margo v. Weiss*, 213 F.3d 55.

## II.

## THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT TO AN IMPARTIAL HEARING AND ALSO OPINION BELOW CONFLICTS WITH THIS COURT'S RULING THAT THE DOCTRINE OF PRECLUSION DO NOT APPLY TO THE LEGAL RECORD WHICH WAS NOT REVIEWED BY THE STATE AGENCY WHERE IT HAD BEEN FILED.

1. The judgment for the Doctor's title VII complaint which included the hospital's retaliatory and discriminatory non-selection for promotion in years 1992 and 1994 as well as its suspension and dismissal was denied by District Judge in March 2000, (the instant case) before to have a hearing for the Doctor's non-selection for promotion ("non-selection") complaint which was filed in the State Civil Service Commission ("S.C.S.C.") (*see* App. B, p. 15, n.4). As it has been detailed in the instant appellant briefs, there has been noticeable implausibilities, inconsistencies and contradictions involving the hospital's behaviors in reference to the Doctor's non-selection both in year 1992 and 1994.

The District court's Judgment in reference to the hospital retaliatory and discriminatory non-selection relied merely upon a few statements written in the hospital's summary judgment, in that the hospital has totally avoided any discussion in reference to the Doctor's non-selection of year 1992. Following dismissal of the Doctor's Title VII complaint, in April 2000, the Doctor motioned for examination of S.C.S.C's impartiality (a copy of the motion is attached, Lodging pp. 59-62). The commissioner denied the motion. Then the Doctor informed the commissioner that her Order denying the motion was being appealed and requested for the continuation of the hearing for non-selection. The commissioner ignored the appeal and held a hearing before to inform the Doctor that her request for continuation of the hearing was denied and dismissed the Doctor's complaint for non-selection for promotion in the absence of the Doctor in May 2000 (For documentation see above the Statement of the Case).* Consequently the District court's judgment as well as the commissioner's Order have been in full contradiction with the Fourteenth Amendment

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* The Doctor was passed over for promotion twice first in year 1992 when not a single complain has been reported against the Doctor's patient care and then in 1994. The resolution of this matter would have necessitated the proceedings involving the investigations and the hearing and was far beyond a few statements written in the summary judgment. The conclusion of promotion hearing would have had tremendous impact on the doctor's pension plan and therefore the Doctor's total income for the rest of her life. The Doctor's hearing for non selection for promotion was dismissed by commissioner on May 4, 2000 in the absence of the Doctor which was a direct violation of the Doctor's due process rights. Because the Doctor requested the commissioner to continue the hearing because the commissioner's order denying the Doctor's motion for examination of the commissioner's impartiality was being appealed. The commissioner while in violation of due process law ignored the appeal and held a hearing before to inform the Doctor that her request for continuation was being denied and dismissed the claim (*see* Lodging, pp. 58-61 & 42-57).



of U.S.C.A. Therefore, the Third Circuit affirmation of the lower courts' decisions was in conflict with the United States Constitution as well as with the decision of the other circuits in similar cases. *See Ventura v. Shalala*, C.A. 3 (Del.) 1995, 55 F.3d 900; *see Dannehl v. Department of Motor Vehicle Neb. App. 1995*, 529 N.W.2d. 100 "Central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard"; *see Gorham v. Town of Cape Elizabeth*, Me. 1993, 625 A.2d 898 "Applicant before administrative board is entitle under due process clause of federal and state constitutions to fair and unbiased hearing"; *see* "Due process guarantees right to an impartial tribunal." *Sindermann v. Civil Service Com'n of Village of Gurnee*, Ill. App. 2 Dist. 1995, 657 N.E.2d 41, 212 Ill. Dec. 346, 275 Ill. App. 3d 917, *appeal denied*, 662 N.E.2d 431, 214 Ill. Dec. 865, 165 Ill. 2d 565; *see* "when state has provided means of appeal it can not put limitations on it which are discriminatory and arbitrary" *Bank v. Dudley*, 1979, 278 N.W.2d 334, 203 Neb. 226, *appeal dismissed*, 100 S. Ct. 24, 444 U.S. 804, 62 L. Ed. 2d 17.

2. Finally the Third Circuit has concluded that if the Doctor prevails in her claim that the employer has discriminated and retaliated against the Doctor then the Doctor's claim will be barred by doctrine of preclusion. Because the Doctor did not have a hearing for non-selection complaint therefore, the Third Circuit has departed from the accepted and usual course of judicial proceedings by implementing the doctrine of claim preclusion and the issue of preclusion for a legal record which has not been reviewed by the state agency where it had originally been filed. Fed. R. Civ. P. 131.22 Claim preclusion doctrine does not apply to actions based on different claim. *See University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986) "unreviewed state administrative proceedings do not have preclusive effect on title VII claims"; *see Copeland v. Merrill Lynch & Co.*,

47 F.3d 1415, 1423 (5th Cir. 1995); *see Meyer v. Rigdon*, 36 F.3d 1375, 1379 (7th Cir. 1994) "default judgment previously entered against debtor in litigation given collateral estoppel effect, preempting tradition principle."

3. Fed. R. Civ. P. 131.22[1] "if such facts in *themselves* establish independent grounds for a claim against the defendants in the previous action, claim preclusion does not apply, even if the new claim are based on the same legal theories or seek the same damages as the prior action." *See Spiegel v. Continental Ill. Nat'l Bank*, 790 F.2d 638, 646 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) (acts of mail fraud occurring after filing of complaint in prior action could be basis for subsequent action even though legal theories, other related facts, and alleged damages were same as prior action); *see St. Pierre v. Dyer*, 208 F.3d 394, 399-401 (2d Cir. 2000) (judgment cannot be given effect of precluding claims that did not even exist at time of judgment). Consequently the doctrine of claim preclusion neither can be implemented to the perjury and forgery claim which has been filed against the Doctor's supervisor who has committed perjury in reference to the Doctor's patient care which has direct relation to the Doctor's termination in year 1994 (*Bazargani v. Glazman*) (a copy is attached, *see* Lodging pp. 63-73) nor it can be implemented to the impact of perjury claim upon the treatment of the patients of the Doctor verses Dr. Rim. Consequently the Third Circuit has departed from the accepted and usual course of judicial proceedings by implementing the doctrine of claim preclusion and the issue of preclusion for a legal record which has not been reviewed by the state agency where it had originally been filed. Given the inconsistency with the uniform decisions of other courts of appeals the Third Circuit analysis of the instant case has been inexplicable.



## III.

## THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING THAT THE ELEVENTH AMENDMENT IMMUNITY DO NOT APPLY WHEN THE DEFENDANTS HAVE BEEN IN DIRECT VIOLATION OF TITLE 18 U.S.C.A. § 1623(a)

1. Because the hospital's administration were in violation of Title 18 U.S.C.A. § 1623(a) and because the Doctor has been deprived from her due process rights, therefore, the Doctor (appellant) is entitle of Fed. R. Civ. P. 123.40[3][a]

> By violating the federal constitutional rights of citizens, state officials are stripped of any official or representative capacity. As such, they may be sued personally for the consequences of their unconstitutional conduct. This . . . is to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of federal law.

Consequently the district court judgment and the Third Circuit ruling about application of Eleven Amendment have departed from the accepted and usual course of judicial proceedings. *See Culinary Workers Union, Local 226 v. Del. Papa.*, 200 F.3d 614, 619 (9th Cir. 1999); *see Waste Management/Holding, Inc. v. Gilmore*, 252 F.3d 316, 329-340 (4th Cir. 2001).

## CONCLUSION

For the forgoing reasons the petition for certiorari should be granted for reviewing the title VII No. 00-1390.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 12, 2002**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No: 00-1390

TAWOOS BAZARGANI,

Appellant

v.

HAVERFORD STATE HOSPITAL

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-7377)
District Judge: Honorable Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a)
April 2, 2002

Before: SCIRICA, BARRY and COWEN, *Circuit Judges*.

(Filed: April 12, 2002)

*Appendix A*

**OPINION**

PER CURIAM

Dr. Tawoos Bazargani appeals *pro se* the District Court's order granting summary judgment in favor of Haverford State Hospital ("Haverford").[1] Bazargani asserts claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §2000e *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"). Because this is an appeal from the District Court's grant of summary judgment, we exercise plenary review. *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 142 (3d Cir.1987).

The District Court's opinion contains a thorough recitation of the facts. *See Bazargani v. Haverford State Hospital*, 90 F.Supp.2d 643 (E.D. Pa. 2000). Therefore, we will not discuss them in detail; rather, we will briefly describe the most significant events leading to this action. In April 1978, Bazargani began working at Haverford as a staff psychiatrist. In 1992, Bazargani applied for a promotion to the position of Psychiatrist Supervisor, but was not selected. As a result, Bazargani filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that her non-selection was the result of discrimination on the basis of her national origin (Iranian) and religion (Muslim). Bazargani subsequently filed a Title VII lawsuit against Haverford on November 21, 1994, which she voluntarily dismissed in September 1995.

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1. Bazargani was represented by counsel in the District Court.



*Appendix A*

In June 1994, another Psychiatrist Supervisor position became available at Haverford. Four individuals, including Bazargani, were interviewed for the position by an interview panel, which ranked the candidates. Dr. Aidan Altenor, then hospital Superintendent, adopted the panel's recommendation, and selected Dr. Fernandes for the position of Psychiatrist Supervisor. Bazargani was notified of this decision on November 30, 1994.

Meanwhile, during the selection process, Bazargani became the subject of disciplinary actions at Haverford due to her alleged failure to comply with hospital policies and procedures, and her questionable fitness for work. As a result, in October and November 1994, Bazargani attended several pre-disciplinary conferences. On November 23, 1994, Altenor sent Bazargani a letter notifying her that she was being temporarily relieved of her duty effective the close of business. On December 12, 1994, Altenor notified Bazargani that she was being suspended from her position as Staff Psychiatrist without pay pending an investigation. On December 27, 1994, Bazargani challenged her suspension by filing an appeal with the Pennsylvania State Civil Service Commission ("the Commission").

By letter dated December 22, 1994, Bazargani's suspension was converted into a termination effective December 27, 1994. The following reasons were cited in Altenor's letter for Bazargani's termination: (1) inappropriate prescribing of medications, failure to comply with hospital policies and monitoring practices which resulted in one patient's hospital admission; (2) failure to follow policy and procedure with respect to two male patients; and (3) failure

to follow direction, policy and procedure, and falsification of documents with respect to a fourth patient. On January 18, 1995, Bazargani challenged this decision by filing an appeal with the Commission. Bazargani's suspension and termination appeals were then consolidated by the Commission.

In April 1995, Bazargani filed another charge with the EEOC. In the April charge, Bazargani alleged that Haverford's failure to promote her in November 1994, and her suspension and subsequent termination in December 1994, were motivated by religious and national origin discrimination as well as discriminatory retaliation.

On March 24, 1997, the Commission sustained both Bazargani's suspension and her termination. Specifically, the Commission concluded that Bazargani failed to follow hospital policies and procedures with respect to the Lithium treatment of two patients. The Commission's findings do not include a discussion of Bazargani's discrimination and retaliation claims. Bazargani appealed the decision to the Pennsylvania Commonwealth Court, which affirmed the Commission's findings. *See Bazargani v. State Civil Serv. Comm'n*, 711 A.2d 529 (Pa. Cmmw. 1998). The Pennsylvania Supreme Court denied her petition for allowance of appeal. *See Bazargani v. State Civil Serv. Comm'n*, 732 A.2d 1211 (Pa. 1998).

On September 5, 1997, the EEOC issued Bazargani a right to sue letter in connection with the April 1995 charge. Bazargani then filed this action in the District Court on



December 5, 1997. The District Court ultimately granted summary judgment in favor of Haverford. We will affirm that judgment.

The District Court correctly concluded that Bazargani's PHRA claims are barred in federal court by the Eleventh Amendment. Absent the express consent of a state, or a clear and unequivocal wavier by Congress, a state is immune from suit in federal court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Until it closed in 1998, Haverford was an institution operated by the Pennsylvania Department of Welfare. *See Kathleen S. v. Dept. of Public Welfare*, 10 F.Supp.2d 460 (E.D. Pa. 1998). Eleventh Amendment immunity extends to "suits against departments or agencies of the state having no existence apart from the state," such as Haverford. *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). Here, Pennsylvania has not expressly consented to suit, *see* 42 Pa. Cons. Stat. Ann. § 8521(b), nor has Congress issued a clear and unequivocal waiver of Eleventh Amendment immunity.

The District Court also properly concluded that Bazargani's termination was not based on her national origin or religion. Under the three step burden-shifting analysis articulated by the Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), an employee must first establish a prima facie case of discrimination, which creates a presumption that her employer has unlawfully discriminated against her. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Haverford has conceded that Bazargani can make out a prima facie case of discrimination by termination.

Once the employee establishes her prima facie case, the burden of production shifts to the employer, who must then articulate a legitimate, non-discriminatory reason for its actions. *See id.* at 507. Haverford argued that Bazargani was discharged because "[s]he violated hospital policies and generally accepted medical standards in her management of two patients who had been prescribed Lithium," thereby posing a danger to her patients. *Bazargani*, 90 F.Supp.2d at 649. Because Haverford articulated a legitimate, non-discriminatory reason for Bazargani's termination, the presumption of discrimination dropped from her case. *See Velasco v. Illinois Dept. of Human Services*, 246 F.3d 1010 (7th Cir. 2001).

Bazargani then bore the burden of persuading the fact finder that Haverford's articulated reason is merely a pretext for discrimination. To survive summary judgment, Bazargani had to

> point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.

*Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). Bazargani attempted to discredit Haverford's articulated reason by arguing that her treatment of patients was proper,





and to show that discrimination was more likely than not a cause for Haverford's employment action by comparing herself to another Haverford Psychiatrist.

Bazargani argued in the District Court, as well as at great length on appeal to this Court, that Haverford did not have just cause to terminate her employment because she did not violate hospital policies and procedures. We agree with the District Court that the doctrine of issue preclusion bars re-litigation of this issue. Issue preclusion bars relitigation of an issue identical to that in a prior action. *See Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993). "A federal court applying preclusion principles is bound by the Full Faith and Credit Statute, 28 U.S.C. § 1738 and must give a prior state judgment the same effect as would the adjudicating state." *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988). Under Pennsylvania law, issue preclusion is warranted when the following conditions are met: "(1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom it is asserted had a full and fair opportunity to litigate the issue in question in the prior action." *Id.* (quoting *Safeguard Mut. Ins. Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975). Here, all four conditions were met. The issue of just cause for termination was specifically addressed by the Commission, resulting in a final, court-reviewed judgment on that issue. *See Bazargani v. State Civil Serv. Comm'n*, 711 A.2d 529 (Pa. Cmmw. 1998). Bazargani was a party to the prior litigation and had a full and fair opportunity litigate the issue of just cause.

Accordingly, Bazargani is barred by the doctrine of issue preclusion from arguing in this action that Haverford was without just cause to terminate her employment.

Bazargani also attempted to establish pretext by comparing herself to another Haverford Psychiatrist whose allegedly similar, improper treatment of a patient did not lead to any disciplinary action. Bazargani failed to show that the individual with whom she compared her treatment had "dealt with the same supervisor, [had] been subject to the same standards and [had] engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

Accordingly, the District Court properly concluded that Haverford was entitled to summary judgment on Bazargani's claim of discrimination by termination.

In addition to arguing that she was terminated as a result of national origin and religious discrimination, Bazargani has argued that Haverford terminated her in retaliation for filing charges with the EEOC and the Commission, and otherwise complaining about their practices. To advance a prima facie case of retaliation in violation of Title VII, an employee must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000). Haverford has conceded that Bazargani





can establish the first two elements of her prima facie retaliation claim. To establish causation, Bazargani appears to have relied exclusively on temporal proximity between her actions and Haverford's alleged retaliation. In this case the timing of the parties' actions is not "unusually suggestive," *see id.*, and thus cannot establish causation.[2]

Moreover, even if Bazargani had established her prima facie case, Haverford has stated a legitimate, non-retaliatory reason for terminating Bazargani. *See generally Weston v. Pennsylvania*, 251 F.3d 420, 432 (3d Cir. 2001) (*McDonnell Douglas* burden-shifting analysis applies to Title VII retaliation claims)). As we have explained, Bazargani failed to produce sufficient evidence that Haverford's articulated reason for her termination was a pretext, or that Haverford was more likely than not motivated by a discriminatory reason. *See Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 199 (3d Cir. 1996). Therefore, summary judgment was properly granted for Haverford on Bazargani's retaliation by termination claim.[3]

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2. To substantiate her causation argument on appeal, Bazargani would have this Court consider documents that are not included in the District Court record. This we will not do. Fed. R. App. P. 10(e). Moreover, the documents, purported service of process in Bazargani's first discrimination suit against Haverford, filed on November 21, 1994, are uncertified, lack any indicia of authenticity, do not include civil numbers, and do not state what was supposedly served.

3. In addition, we agree with the District Court that even if Bazargani had presented sufficient evidence of her discrimination and retaliation by termination claims to proceed to trial, the claims are nonetheless barred by the doctrine of claim preclusion.

*Appendix A*

The District Court also properly granted summary judgment in favor of Haverford on Bazargani's discrimination claim based upon Haverford's failure to promote her to the Psychiatric Supervisor position in 1994. Haverford again has conceded that Bazargani can make out a prima facie case of discrimination. The burden of production thus shifted to them to state a legitimate, non-discriminatory reason for Bazargani's non-selection. Haverford met this burden by contending that Dr. Fernandes was selected for the position of Psychiatric Supervisor in 1994 because she was better qualified. *See Fuentes v. Perskie*, 32 F.3d 759, 765-66 (3d Cir. 1994).

To establish discrimination, Bazargani was required to point to some evidence from which a factfinder could reasonably find that Haverford's reason was pretextual. *See id.* at 764. Bazargani was unable to meet this burden in that she failed to offer any evidence demonstrating "implausibilities, inconsistencies, incoherences, or contradictions," *id.* at 765, in Haverford's articulated reason for her non-promotion. Instead, Bazargani's pretext evidence consisted of her statement that she was "discriminated on the basis of her national origin because the persons [sic] selected for promotion were [sic] of a different national origin and religion than she, and she was as qualified or better qualified for the position." Such "[c]onclusory assertions of discrimination are insufficient to raise an issue of material fact." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

Finally, summary judgment was properly granted for Haverford on Bazargani's retaliation by non-promotion claim. Again, Haverford has conceded that Bazargani can



*Appendix A*

make out the first two elements of her prima facie case of retaliation, but argues that she cannot establish causation. We agree with the District Court that Bazargani was unable to establish a causal connection between her protected activity and Haverford's November 1994 decision not to promote her. Moreover, as previously stated, Haverford has articulated a legitimate, non-retaliatory reason for its decision which Bazargani was unable to establish was pretextual.

Accordingly, we will affirm for the reasons articulated herein and by the District Court.

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TO THE CLERK:

Please file the foregoing opinion.

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Circuit Judge

**APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 31, 2000, ENTERED AND FILED APRIL 4, 2000**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 97-7377

TAWOOS BAZARGANI,

Plaintiff,

v.

HAVERFORD STATE HOSPITAL,

Defendant.

MEMORANDUM

EDUARDO C. ROBRENO, J. MARCH 31, 2000

Plaintiff Tawoos Bazargani, a former psychiatrist on staff at defendant Haverford State Hospital[1] ("Haverford" or "the hospital"), brought this employment discrimination action alleging that Haverford discriminated against her based upon her national origin and her religion in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended,

1. Haverford closed effective June 30, 1998.



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42 U.S.C. § 2000e *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 951 *et seq.* Plaintiff also contends that Haverford unlawfully retaliated against her as a result of her filing employment discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") and because she "otherwise" protested Haverford's unlawful actions.

Presently before the court is Haverford's motion for summary judgment. Haverford's motion will be granted for the following reasons. First, plaintiff is precluded from bringing her PHRA claims against Haverford in federal court under the Eleventh Amendment. Second, plaintiff's discrimination claim relating to her termination fails because plaintiff has not rebutted Haverford's legitimate, non-discriminatory reason for terminating her employment. Third, plaintiff's retaliation claim relating to her termination fails because plaintiff has not established a prima facie case of retaliation and because plaintiff has not rebutted Haverford's legitimate, non- retaliatory reason for terminating plaintiff's employment. Fourth, plaintiff's discrimination claims and retaliation claims relating to her termination are, in any event, barred by the doctrine of claim preclusion. Fifth, plaintiff's discrimination claim relating to her non-promotion fails because plaintiff has not rebutted Haverford's legitimate, non-discriminatory reason for not promoting her. Finally, plaintiff's retaliation claim relating to her non-promotion fails because plaintiff has not established a prima facie case of retaliation nor has she rebutted Haverford's legitimate, non-retaliatory reason for not promoting her.

*Appendix B*

I. FACTS

Plaintiff began working as a staff psychiatrist for Haverford in April of 1978.[2] In 1992, plaintiff applied, but was not selected, for a promotion to Psychiatrist Supervisor. In June of 1993, plaintiff challenged that non-promotion to the EEOC, claiming that she was the victim of national origin (Iranian) and religious (Muslim) discrimination. In August of 1994, the EEOC issued a no cause letter to plaintiff. Plaintiff subsequently filed suit against Haverford pursuant to Title VII on November 21, 1994 claiming that her non-selection was discriminatory, *see Bazargani v. Haverford State Hospital*, Civil Action No. 94-7071, but voluntarily dismissed that action in September of 1995.

Meanwhile, in June of 1994, another Psychiatrist Supervisor position became available. In July of 1994, plaintiff wrote a letter to the then-hospital Superintendent, Aidan Altenor, Ph.D., complaining that the posting for this second position had been improper. As a result of plaintiff's complaint, Dr. Altenor "reposted" the position. Plaintiff was among those who applied for the vacant position by submitting her application on October 25, 1994.

Four individuals, consisting of plaintiff, a Dr. Fernandes, a Dr. Sekharan, and a Dr. Pashupathi, were interviewed for the vacant position. The interview panel consisted of several medical professionals, only one of whom was associated with

2. In September of 1993, plaintiff began working in Haverford's Unit 14 East, which housed elderly, mentally-ill patients and younger patients with violent tendencies.



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Haverford State Hospital.[3] After interviewing each candidate, the panel ranked the candidates in order of preference. Dr. Altenor, adopting the panel's ranking, made the final decision to select Dr. Fernandes, a decision of which plaintiff became aware on November 30, 1994. After learning of Dr. Fernandes' selection, plaintiff challenged this decision by filing an appeal with the Pennsylvania State Civil Service Commission (the "Commission").[4]

While this selection process was going on, plaintiff became the subject of various disciplinary actions at Haverford due to her performance. Specifically, allegations that plaintiff had failed to comply with hospital policies and procedures and that her fitness for work was questionable resulted in her attendance at several "predisciplinary conferences" in October and November of 1994. On November 23, 1994, Dr. Altenor sent plaintiff a letter temporarily relieving her of duty effective the close of business. In the letter, Dr. Altenor states that plaintiff made "inappropriate" and "delusional" remarks during a conversation with a court-appointed psychiatrist and that plaintiff's "reasoning [was] impaired," thereby jeopardizing the safety and well-being of plaintiff and her patients.

3. The individuals were: Dr. Raihana Beg (Chief of Clinical Services, Eastern State School and Hospital), Dr. Arthur Huntley (Chief of Psychiatry, Norristown State Hospital), Dr. Linda Kuntz (Southeast Region Medical Director), and Dr. Mia Marcovici (Assistant Superintendent for Clinical Services, Haverford State Hospital).

4. The parties have not informed the court of any decision by the Commission on plaintiff's appeal of her non-promotion.

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*See* Pl.'s Mem. of Law in Response to Def.'s Mot. for Summ. J. [hereinafter "Pl.'s Resp."], Ex. 4. Dr. Altenor further wrote that plaintiff could not return to work unless she provided a medical certification releasing her to work.[5] *Id.*

On December 12, 1994, following a predisciplinary conference, Dr. Altenor gave plaintiff another letter, which was dated December 9, 1994.[6] This letter stated:

> This is to inform you that you are being suspended pending investigation without pay from your position as Staff Psychiatrist . . . effective the close of business December 9, 1994. . . . The reason for your suspension pending investigation is that we feel that you continue to be unfit for duty and in this state, could be a danger to yourself or others. This, in addition to the prior allegations for which you have already received predisciplinary

5. Dr. Cheryl Ann Kennedy subsequently examined plaintiff and found her free of any impairment or psychiatric problems that would interfere with her care of patients. It appears that plaintiff then returned to work.

6. In her response, plaintiff claims that on December 9, 1994, she was given a letter that merely relieved her from direct patient care. This first letter dated December 9, 1994 has not been produced for court. Plaintiff also states that on December 9, 1994, she met with two of defendant's administrators and at the conclusion of that meeting, it was determined that plaintiff would be reassigned to Haverford's Quality Assurance Department effective December 12, 1994. *See* Pl.'s Resp., Ex. 6, Pl.'s Resp. to Def.'s Requests for Admission, ¶ 12. Plaintiff does not explain any reasonable inference that could be drawn from this first letter.



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> conferences for which still may be addressed through the disciplinary process."

Pl.'s Resp., Ex. 7. On December 27, 1994, plaintiff appealed her suspension to the Commission.

By letter dated December 22, 1994, plaintiff's suspension was converted into a termination effective December 27, 1994. In that letter, Dr. Altenor listed the following reasons for plaintiff's termination: (1) inappropriate prescribing of medications, failure to comply with hospital policies and monitoring practices which resulted in one patient's hospital admission,[7] (2) failure to follow policy and procedure with respect to two patients; and (3) failure to follow direction and failure to follow policy and procedure, falsification of documents for yet a fourth patient. On January 18, 1995, plaintiff appealed her termination to the Commission, which consolidated this appeal with that relating to her suspension.[8]

7. Haverford contended, *inter alia*, that plaintiff improperly treated a patient, Caroline K., by allowing the Lithium levels in Caroline K.'s body to become life-threatening. In fact, as of result of her increased Lithium levels, Caroline K. lapsed into a coma and had to be immediately transferred to a nearby hospital. Haverford further contended that plaintiff was unresponsive to her supervisor's instructions to correct Caroline K.'s Lithium levels.

8. Plaintiff filed another EEOC charge in April of 1995, alleging that Haverford's failure to promote her to the second vacant Psychiatrist Supervisor position in November of 1994 and her suspension and termination later in 1994 were motivated by religious and national origin discrimination. This charge was subsequently cross-filed with the PHRC.

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The Commission conducted hearings on October 31, 1995 and May 1, 1996. On March 24, 1997, the Commission, in a written adjudication, sustained plaintiff's suspension and termination, finding that Haverford had just cause for plaintiff's suspension and eventual removal.[9] Nowhere in the Commission's written findings is any discussion of plaintiff's discrimination and retaliation claims. Plaintiff then appealed this administrative decision to the Pennsylvania Commonwealth Court, which affirmed the Commission's finding. *See Bazargani v. State Civil Serv. Comm'n*, 711 A.2d 529 (Pa. Cmwlth. 1998). Like the Commission's written findings, the Commonwealth Court opinion does not contain any discussion of plaintiff's discrimination and retaliation claims. The Supreme Court denied her petition of appeal. *See Bazargani v. State Civil Serv. Comm'n*, 732 A.2d 1211 (1998) (table).

On September 5, 1997, the EEOC issued plaintiff a right to sue letter in connection with the charge she filed in April of 1995. Plaintiff subsequently filed the instant suit.

## II. LEGAL STANDARD

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter

9. The Commission found that Haverford had presented credible and significant evidence supporting the majority of charges leveled against plaintiff (those charges relating to plaintiff's treatment of Caroline K. and another patient named Theresa M.) and thus had good cause to terminate her employment. The Commission also found, however, that two charges remained unproven after the evidence had been presented.



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of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. *See Big Apple BMW, Inc. v. BMW of N. Amer., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. *See* Fed.R.Civ.P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." *Harter v. GAF Corp.*, 967 F.2d 846, 852 (3d Cir. 1992); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986). A party opposing summary judgment, however, must do more than rest upon mere allegations, general denials, or vague statements. *See Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884, 890 (3d Cir. 1992).

## III. ANALYSIS

Haverford asserts that it is entitled to summary judgment for several reasons. First, Haverford argues that plaintiff is barred from bringing her PHRA claims in this forum pursuant to the Eleventh Amendment. Second, Haverford contends that plaintiff is prohibited from pursuing her discrimination and retaliation claims regarding her termination because of

claim preclusion principles. Third, Haverford maintains that plaintiff cannot raise a genuine issue of fact that Haverford's reasons for terminating her employment were pretextual. Fourth, Haverford argues that plaintiff's claim of retaliation in connection with her termination fails because plaintiff cannot establish a causal connection between her termination and her participation in protected activity. Fifth, Haverford contends that plaintiff has not raised a genuine issue of fact that Haverford's reasons for not selecting her for promotion in November of 1994 were pretextual. Finally, Haverford argues that plaintiff's claim of retaliation in connection with her non-promotion fails because plaintiff cannot establish a causal connection between Haverford's decision not to promote her and her participation in protected activity.

A. *Plaintiff's PHRA Claims Are Barred by the Eleventh Amendment.*

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court "has long 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms [,]' " *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)), namely "that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Id.*



Under the Eleventh Amendment, absent express consent by the state in question or a clear and unequivocal waiver by Congress, states are immune from suit in federal court. *See Seminole Tribe*, 517 U .S. at 54; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Pennsylvania has not expressly consented to suit. *See* 42 Pa. Cons. Stat. Ann. § 8521(b)[10]; *see also Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). In addition, Eleventh Amendment immunity extends "to suits against departments or agencies of the state having no existence apart from the state." *Laskaris*, 661 F.2d at 25. Therefore, Haverford, as a institution that was operated by the Pennsylvania Department of Welfare, is also entitled to Eleventh Amendment immunity. *See Griest v. Norristown State Hosp.*, No. CIV.A. 96-8495, 1997 WL 661097, at *8 (E D. Pa. Oct. 22, 1997) (citing *Murray v. Norristown State Hosp.*, No. CIV.A. 89-1478, 1989 WL 36966, at *1 (E.D. Pa. Apr. 17, 1989)).

Moreover, although Congress has waived Eleventh Amendment immunity in the Title VII context, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975), there is no such waiver by Congress to suit in federal court with respect to PHRA claims. *See Kidd v. Commonwealth of Pa.*, No. CIV.A. 97-5577, 1999 WL 391496, at *4 (E.D. Pa. May 20, 1999) (noting that "all of Plaintiff's PHRA claims against the Defendants are barred by the doctrine of sovereign immunity") (citing cases). Accordingly,

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10. This statute provides in pertinent part that "[n]othing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 8521(b).

plaintiff must pursue her PHRA claims against Haverford, if at all, in state court.

B. *Plaintiff's Claims Centered on her Termination*[11]

1. *Plaintiff's "Discrimination by Termination" Claim*

Barring direct evidence of discrimination, a plaintiff may establish discrimination through circumstantial evidence, with the benefits of the burden-shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). First, a plaintiff must establish a prima facie case of discrimination, which creates a presumption that the employer has unlawfully discriminated against the employee. *Burdine*, 450 U.S. at 257. Once the plaintiff establishes a prima facie case, a burden of production shifts to the defendant who must articulate a legitimate, non-discriminatory reason for the action. If an employer articulates such a reason, the plaintiff bears the burden of persuading the finder of fact that the employer's articulated reason is a pretext.

a. *Plaintiff's prima facie case*

To establish a prima facie case of discrimination based on her national origin, plaintiff must show: (1) that she belongs to a protected class; (2) that she was qualified for the position; and (3) that she was terminated under

11. Because plaintiff's suspension was later transformed into her termination, the court will simply use the term "termination."



circumstances that give rise to an inference of unlawful discrimination.[12] *See Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 356-57 (3d Cir. 1999); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989); *see also Leung v. SHK Mgmt., Inc.*, No. CIV.A. 98-3337, 1999 WL 1240961, at *3 (E.D. Pa. Dec. 21, 1999). Allegations of disparate treatment on account of religion also follow the above-stated traditional Title VII analysis, although courts have slightly modified the prima facie case to require plaintiff to show further that she informed her employer of her religious beliefs. *See, e.g., Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) (citing *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986), and *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991)).

Haverford concedes for purposes of this motion that plaintiff could make out a prima facie case of discrimination with respect to her termination claim.[13] Thus, Haverford must meet its burden of production by stating a legitimate, nondiscriminatory reason for terminating plaintiff.

12. Under recent Third Circuit jurisprudence, the elements of the prima facie case of a discrimination claim are not to be rigidly applied. Indeed, a discrimination plaintiff need not show, as part of her prima facie case, that she was replaced by someone outside her protected class or that someone outside her protected class received the promotion. *See generally Jones v. School Dist. of Phila.*, 198 F.3d 403, 411 (3d Cir.1999); *Pivirotto*, 191 F.3d at 352-53.

13. Although Dr. Altenor contends in his affidavit that he was unaware of plaintiff's religious background, *see* Def.'s Mot. for Summ. J., Ex. D, ¶ 12, Haverford does not appear to argue that because plaintiff failed to inform it of her religious beliefs, she cannot meet her prima facie case.

b. *Haverford's legitimate non-discriminatory reason*

Once the plaintiff establishes her prima facie case, a burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions. *See McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 252-55; *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). The defendant's burden at this stage is relatively light: It is satisfied if the defendant articulates any legitimate reason for the discharge. Although the defendant need not prove that the articulated reason actually motivated the discharge, *see Fuentes*, 32 F.3d at 763, the reason must be "clear and reasonably specific," *see Johnson v. Women's Christian Alliance*, 76 F. Supp. 2d 582, 585 (E.D. Pa. 1999) (quoting *Burdine*, 450 U.S. at 257), "to afford the plaintiff-employee a fair opportunity to pierce the proffered reason with facts of record." *Id.* at 586.

Haverford has articulated a clear and reasonably specific legitimate, non-discriminatory reason for terminating plaintiff's employment. Haverford contends that it discharged plaintiff because "[s]he violated hospital policies and generally accepted medical standards in her management of two patients who had been prescribed Lithium" thereby posing a genuine danger to her patients. Def.'s Mem. of Law in Support of its Mot. for Summ. J. at 29-30; *see also id.* at 6-7 (stating also that plaintiff "did not modify her unacceptable practices" to conform to hospital standards). Specifically, plaintiff's management of the Lithium levels of one of those patients resulted in the patient lapsing into a coma requiring immediate hospitalization. *Id.* at 34. The court concludes that Haverford has met its burden of production



by stating a clear and reasonably specific legitimate, non-discriminatory reason for terminating plaintiff's employment. Thus, at this point, the presumption of discrimination drops from the case. *Fuentes*, 32 F.3d at 763.

c. *Plaintiff's evidence of pretext*

Once the defendant articulates a clear and reasonably specific legitimate, non-discriminatory reason for its actions, to defeat summary judgment, the plaintiff "must point to some evidence, direct or circumstantial, from which a reasonable finder of fact could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3d Cir. 1995) (citing *Fuentes* ).

The plaintiff can satisfy the first alternative prong by "demonstrat[ing] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them 'unworthy of credence.' " *Fuentes*, 32 F.3d at 765 (quoting *Ezold v. Wolf, Block, Schorr, & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1993)); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc). In other words, a plaintiff may meet this standard "by demonstrating, through admissible evidence, that the employer's articulated reason was not merely wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." *Jones*, 198 F.3d at 413 (internal quotations omitted); *see also St. Mary's*

*Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."). Alternatively, a plaintiff can satisfy the second prong by showing " 'that the employer has previously discriminated against the plaintiff, that the employer had previously discriminated against other persons within the plaintiff's protected class, or that the employer has treated more favorably similarly situated persons not within the protected class.' " *Jones*, 198 F.3d at 413 (quoting *Simpson v. Kay Jewelers*, 142 F.3d 639, 645 (3d Cir. 1998)). At all times, the burden of persuasion remains with the plaintiff. *Burdine*, 450 U.S. at 253.

Plaintiff seeks to establish that Haverford's articulated reason for terminating her is a pretext for national origin and religious discrimination by comparing herself to another Haverford psychiatrist, a Dr. Rim,[14] whose allegedly similar treatment (with respect to Lithium levels) of a patient, Doris E., did not lead to any discipline. Further, plaintiff apparently attempts to show pretext by also arguing that plaintiff's treatment of Caroline K. was not improper.[15] *See* Pl.'s Resp. at 7 n.1, 10-11. Plaintiff has not met her burden for two reasons.

14. The court notes that it has not been informed of Dr. Rim's national origin or religion.

15. The court disagrees with plaintiff's implicit suggestion that an inference of national origin or religious discrimination can be drawn simply because Haverford was unable to prove two of the four allegations supporting its removal of plaintiff in the proceedings before the Commission. These multiple grounds are not inconsistent grounds. *See Farrell v. Planters Lifesavers Co.*, __ F.3d __, No. 98-6410, 2000 WL 236418, at *7 (3d Cir. Mar. 3, 2000) (noting that connection between adverse employment action and protected activity may be established where employer gives inconsistent reasons for terminating plaintiff).





First, the court notes that plaintiff is barred, under the doctrine of issue preclusion,[16] from challenging the Commission's findings, subsequently adopted and affirmed by the Commonwealth Court, that she failed to follow hospital policies and procedures with respect to two of her patients, Caroline K. and Theresa M. "In Pennsylvania, issue preclusion 'forecloses relitigation in a later action of an issue of fact or law which was actually litigated and which was necessary to the original judgment.' " *Dici v. Commonwealth of Pa.*, 91 F.3d 542, 548 (3d Cir. 1996) (quoting *Hebden v. Workmen's Compensation Appeal Bd.*, 632 A.2d 1302, 1304 (Pa. 1993)). Clearly the propriety of plaintiff's treatment of Caroline K. and Theresa M. was the identical issue addressed in the first proceeding, which resulted in a final, court-reviewed judgment on that issue. Moreover, plaintiff was a party to the previous proceeding and there is no question that she had a full and fair opportunity to litigate the propriety of her actions. Indeed, she introduced the testimony of another physician who opined that her treatment of those patients was medically acceptable. Accordingly, plaintiff cannot show that Haverford's stated reason for firing her is false.

Second, to the extent that plaintiff seeks to show that Haverford treats similarly situated individuals differently based on religion or national origin, plaintiff "cannot selectively choose a comparator" to establish pretext. *See Simpson v. Kay Jewelers*, 142 F.3d 639, 645 (3d Cir. 1998) (stating although "evidence of the more favorable treatment of a single member of a non-protected class may

16. See pages 29-30, *infra*, for further discussion of issue preclusion.

be relevant, . . . the evidence cannot be viewed in vacuum"). Rather, "[t]o be deemed similarly situated, the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Bullock v. Children's Hosp. Of Phila.*, 71 F. Supp. 2d 482, 489 (E.D. Pa. 1999) (internal quotations omitted); *see also Jalil*, 873 F.2d at 708 (finding that evidence that two other employees were not discharged despite their insubordination was inadequate without some evidence of relevancy because, among other things, plaintiff did not demonstrate that two employees were similarly situated).

Here, plaintiff does not and cannot dispute that, due to the Lithium levels she prescribed and was allegedly monitoring, two of her patients had adverse reactions, one of whom had to be transferred to another hospital in a comatose state. Plaintiff has not alleged that Dr. Rim's patient, Doris E., suffered a similar fate due to Dr. Rim's management of Doris E.'s Lithium levels.[17] Simply showing that Doris E.'s Lithium levels were similarly high is not sufficient. In addition, although plaintiff affirms in her affidavit that Dr. Altenor and her immediate supervisor were

17. The mere fact that plaintiff mismanaged the Lithium levels of two patients as opposed to one patient distinguishes her from Dr. Rim. Further, to the extent plaintiff claims in her affidavit that further discovery would show widespread discrepancies in Lithium levels, *see* Pl.'s Resp., Ex. 1 (Bazargani Aff.) ¶ 17, the court notes that plaintiff failed to respond to Haverford's motion by invoking Federal Rule of Civil Procedure 56(f) and requesting additional time for discovery.



also supervisors to Dr. Rim, plaintiff does not allege that Dr. Rim's treatment of Doris E. was ever brought to either supervisors' attention or even that if the supervisors confronted Dr. Rim, Dr. Rim was unresponsive to the supervisor's instructions.[18] Therefore, Dr. Rim and plaintiff cannot be deemed to be similarly situated, and plaintiff's claim of discrimination based on her termination fails.

2. *Plaintiff's "Retaliation by Termination" Claim*

In her amended complaint, plaintiff alleges that Haverford retaliated against her for filing disability discrimination charges with the EEOC and PHRC and otherwise complaining about Haverford's practices by terminating her employment effective December 27, 1994. *See* Am.Compl. ¶ 11(A). Haverford contends that it is entitled to judgment on plaintiff's unlawful retaliation claims because plaintiff has failed to establish a prima facie case of unlawful retaliation with respect to termination.

a. *Burden-shifting evidentiary framework*

Title VII makes it an "unlawful employment practice"[19] for any employer to discriminate against an employee "because [the

18. Dr. Altenor states in his affidavit that "Dr. Rim's supervisor never brought any questionable practices by Dr. Rim to [his] attention . . . and [thus he] never had any occasion to consider whether any form of disciplinary action against Dr. Rim might be warranted." Def.'s Mot. for Summ. J., Ex. D, ¶ 19.

19. The following actions are prohibited:

> [T]o fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any

(Cont'd)

employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The same burden-shifting mode of analysis applied to plaintiff's discrimination claim is also applicable to her retaliation claim.

First, plaintiff must establish a prima facie case of discriminatory retaliation in violation of Title VII. To do so, plaintiff must show that: "(1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (quoting *Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995)); *see also Farrell v. Planters Lifesavers Co.*, __ F.3d __, No. 98-6410, 2000 WL 236418, at *6 (3d Cir. Mar. 3, 2000).

Second, if the plaintiff establishes a prima facie case of retaliation, the employer must state a legitimate, non-retaliatory reason for its adverse employment action.

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(Cont'd)

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

42 U.S.C. § 2000e-2(a).



*See Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996). This "relatively light" burden is satisfied if the employer states a "clear and reasonably specific" legitimate reason for the adverse action. *See Johnson*, 76 F. Supp. 2d at 585. It is not necessary, however, that the employer show the stated reason actually motivated its decision. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 501 (3d Cir. 1997).

Finally, if the employer meets its burden, the burden shifts back to the plaintiff to persuade the factfinder that the employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action. *St. Mary's Honor Ctr.*, 509 U.S. at 515. The ultimate burden of persuading the factfinder that retaliatory intent had "a determinative effect" on the employer's decision remains at all times with the plaintiff. *Shaner v. Synthes*, 204 F.3d 494, No. 99-1037, 2000 WL 233333, at *5 n.8 (3d Cir. Mar. 2, 2000) (quoting *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932 (3d Cir. 1997)); *Krouse*, 126 F.3d at 501.

b. *Application to plaintiff's claims*

Haverford concedes for purposes of this motion that plaintiff can establish the first two elements of her prima facie case for retaliation, i.e., that she engaged in protected activity and that she suffered an adverse employment action. Haverford argues, however, that plaintiff cannot show a causal connection between her filing of an EEOC charge in June of 1993 and the fact that she was suspended and then terminated in November and December of 1994.

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In response, plaintiff seeks to show a causal connection by arguing that Haverford has overlooked the entire sequence of her protected activities. Plaintiff asserts that she not only filed her first EEOC charge in June of 1993, but that she also filed a discrimination suit in this court relating to that first charge on November 21, 1994.[20] Plaintiff then points to the fact that, all within the time span of one month from the date she filed her first discrimination suit, Haverford suspended her on two different occasions and ultimately terminated her employment. It appears, therefore, that plaintiff is trying to establish an inference of causation by showing the temporal proximity between her November 21st lawsuit and the adverse employment actions that followed. Plaintiff further argues that the Dr. Altenor's testimony before the Commission shows that the facts supporting Haverford's disciplinary actions existed prior to her lawsuit, yet Haverford did not actually discipline her until after she filed suit.[21] *See* Pl.'s Resp. at 11.

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20. Plaintiff filed a second charge with the EEOC in April of 1995. This second charge, filed after the adverse employment actions, is irrelevant for purposes of plaintiff's retaliation claim. *See Robinson*, 120 F.3d at 1301 (finding no causal connection where adverse employment action precedes protected employee activity in Title VII retaliation case).

21. Plaintiff appears to contend that she engaged in protected activity in July of 1994 by sending a letter to Dr. Altenor complaining about the posting of the second vacancy. Review of plaintiff's letter shows that plaintiff was not complaining that the posting was somehow discriminatory, but rather that the posting had not been accessible to her. *See* Pl.'s Resp., Ex. A, Ex. L. The court finds that plaintiff's general complaint regarding the posting does not constitute protected activity. *Cf. Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995) (finding that a general complaint of unfair treatment, via a letter that did "not explicitly or implicitly allege that age was the reason for the alleged unfairness," did not translate into protected activity).



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The Third Circuit has recently reiterated that "temporal proximity between the employee's protected activity and the alleged retaliatory action may satisfy the causal link element of a prima facie retaliation claim, at least where the timing is 'unusually suggestive of retaliatory motive.' " *Shaner*, 2000 WL 233333, at *8 (quoting *Krouse*, 126 F.3d at 503). Indeed, causation has been established in cases where a plaintiff shows that the discriminatory action occurs only days from the protected activity. *See, e.g., Jalil*, 873 F.2d at 708 (finding plaintiff "demonstrated the causal link between the two by the circumstances that discharge followed rapidly, only two days later, upon [the defendant's] receipt of notice of [the plaintiff's] EEOC claim").

For purposes of satisfying the prima facie case, the court will assume that Haverford's actions of twice suspending and ultimately terminating plaintiff's employment shortly after she filed suit could be deemed "unusually suggestive of retaliatory motive." Plaintiff, however, is not entitled to that favorable inference of causation based on the temporal proximity between the protected activity and the adverse employment action unless she can show that the decisionmaker knew of her protected activity at the time he took the adverse employment actions. *See Jones*, 198 F.3d at 415 (affirming district court's grant of summary judgment where "the district court found that [the plaintiff] 'produced no evidence which could in any way be construed as showing any knowledge on the part of either [decision maker] of [the plaintiff's] previous EEO filings"). In this case, plaintiff has not directed the court to any evidence of record tending to indicate that Dr. Altenor, the decisionmaker, knew when he

suspended plaintiff on November 23, 1994 and on December 9, 1994 and when he fired her on December 22, 1994, that plaintiff had filed suit on November 21, 1994.[22] Thus, plaintiff's filing a discrimination lawsuit, followed closely in time by her suspension and termination, in the absence of evidence that the decisionmaker knew of that protected activity, does not satisfy plaintiff's burden to show a causal connection.[23] Nor does Dr. Altenor's knowledge of plaintiff's June of 1993 EEOC charge (approximately seventeen months prior to the adverse employment actions), by itself, establish a causal connection because of its remoteness in time. *Cf. Krouse*, 126 F.3d at 503, 505 (finding period of nineteen months not sufficient by itself to establish causation and that "[i]n addition to the lack of temporal proximity between the 1992 protected conduct and the 1994 decision to deny Krouse's application for a disability pension, there is no evidence that the members of the pension plan committee were aware of Krouse's protected activity."); *see also Shaner*, 2000 Westlaw 233333, at *10 (finding no causal link when "termination took place approximately a year and a half after the filing of the charge and the evidence does not support a finding that there was such intervening discrimination or

22. Plaintiff's bald, unsubstantiated answer to Haverford's interrogatories that the Haverford officials responsible for terminating and suspending her were aware of her lawsuit, *see* Def.'s Mot. for Summ. J., Ex. B, Pl.'s Answer to Interr. 4, is not sufficient to defeat a motion for summary judgment. *See Trap Rock*, 982 F.2d at 890.

23. Although plaintiff sued not only Haverford but also Dr. Altenor in that first lawsuit, a review of the docket in that first suit does not indicate that service of the complaint took place prior to plaintiff's termination.



retaliatory harassment" during that time). Accordingly, the court concludes that plaintiff has not met her prima facie case.[24]

In any event, even if plaintiff had satisfied her prima facie case, Haverford has stated a legitimate, non-retaliatory reason for terminating plaintiff's employment that plaintiff has not pierced with facts of record. Specifically, Haverford asserts that it terminated plaintiff because she had mismanaged the Lithium levels of her patients, in violation of hospital policies and procedures, which resulted in one of her patients lapsing into a coma. As addressed in the previous section, plaintiff has not pointed to any implausibilities, inconsistencies, contradictions, or incoherencies in that reason. *Cf. Robinson*, 120 F.3d at 1301 n. 16. In other words, plaintiff has not offered any evidence showing that reason to be pretextual. Accordingly, summary judgment in favor of Haverford on plaintiff's retaliation by termination claim is also warranted.

C. Claim Preclusion

Even assuming that plaintiff had presented sufficient evidence to allow her to bring her discrimination and retaliation claims relating to her termination to trial, Haverford is entitled to summary judgment on these two claims because these claims are barred by the doctrine of claim preclusion.

24. For the same reasons stated above, absent evidence of Dr. Altenor's knowledge of plaintiff's November 21, 1994 lawsuit, prior to his decision to terminate her employment, merely because Dr. Altenor could have suspended plaintiff in October of 1994 rather than after she filed the lawsuit does not establish a causal connection.

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Haverford argues that, under Pennsylvania principles of claim preclusion, the judgment of the Commonwealth Court affirming the Commission's decision that Haverford had good cause to remove plaintiff precludes any further claims by plaintiff in this action based on her termination.[25] Plaintiff responds by asserting that her claims of religious and national origin discrimination and retaliation are not barred by *issue* preclusion.[26] *See* Pl .'s Resp. at 6. In doing so, plaintiff disregards Haverford's contention that *claim* preclusion, and not *issue* preclusion, is the applicable principle. Rather, plaintiff argues that the issue before the state court was whether Haverford had good cause to dismiss her and that

25. It is well-established that a federal court is bound by the Full Faith and Credit clause, 28 U.S.C. § 1738, to give a prior state court judgment the same claim preclusive effect as that judgment would be accorded in the courts of the state in which the judgment was rendered. *See also Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988). Section 1738 provides in pertinent part, that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken".

Moreover, decisions made by state administrative agencies that have been reviewed by state courts are entitled to preclusive effect in federal court. *See Astoria Fed'l Svgs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479-85 (1982).

26. Plaintiff mistakenly believes that Haverford argued that her non-promotion allegation was subject to the principles of claim preclusion. *See* Pl.'s Resp. at 6. Haverford did not make such an argument. Thus, only plaintiff's claims focusing on her termination are relevant in this portion of the discussion.



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the court did not consider, nor did it have to consider, whether Haverford discriminated against her because of her religion or national origin or whether Haverford terminated her in retaliation for her having engaged in protected activity.

Both issue preclusion and claim preclusion "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Although claim preclusion and issue preclusion are related concepts, and are often confused, the consequences flowing from their respective application are quite distinct. Issue preclusion, sometimes referred to as collateral estoppel, bars a party from relitigating an issue identical to that litigated in a previous action. *See Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993). Claim preclusion, or res judicata, on the other hand, "is broader in effect and prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action." *Id.*; *see also Churchill v. Star Enters.*, 183 F.3d 184, 194 (3d Cir. 1999) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (quoting *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 473 (1998)). Thus, merely because a party did not raise a particular issue in the first judicial proceeding will not enable the party to avoid claim preclusion, if those particular claims could have been raised at that first proceeding.[27] *Churchill*, 183 F.3d at 194; *see also Balent v. City*

27. Under certain circumstances, courts have recognized that a plaintiff may reserve her federal claims by advising the state tribunal of her intention to do so. *See England v. Louisiana State Board of Medical*

(Cont'd)

*of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) ("Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.").

(Cont'd)

*Examiners*, 375 U.S. 411 (1964). The Third Circuit applied *England* 's teachings in *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1071 (3d Cir. 1990). In *Bradley*, the plaintiff expressly informed the defendant and the state tribunal of the nature of his federal claims and of his desire to litigate those claims in federal court. Neither the defendant nor the state tribunal objected to the plaintiff's reservation. Accordingly, the Third Circuit held that the plaintiff's reservation of his federal claims for federal adjudication was proper under *England*. *Id.* at 1071-72.

In this case, plaintiff has not directed the court to any evidence demonstrating that she advised the state tribunal of her desire to preserve her federal discrimination and retaliation claims. Indeed, to the extent the issue was addressed at all, plaintiff sought, in June of 1995, to amend her appeals before the Commission to include claims of national origin and religious discrimination and retaliation. By letter dated June 30, 1995, the Commission granted plaintiff's request. *See* Def.'s Mot. for Summ. J., Ex. A, Att. 5 ("The Commission hereby grants your request to amend [your appeal], challenging your suspension pending investigation and removal, by adding to your appeal discrimination claims based on national origin, religion and retaliation."). Plaintiff, however, never filed an amended appeal form asserting these claims. The only evidence that plaintiff decided not to pursue her discrimination claims is a letter from plaintiff's former counsel to defendant's counsel dated December 8, 1995, stating that plaintiff was "not raising the matter of discrimination in the current case," that plaintiff's discrimination matter could "be better litigated in her EEO case," but that plaintiff may seek to introduce evidence of retaliation. *See* Def.'s Mot. for Summ. J., Ex. G. The court finds that plaintiff's mere letter to defense counsel does not qualify for the *England* reservation of federal rights exception to the rule of claim preclusion.



In the instant case, because plaintiff never raised her national origin, religion discrimination and retaliation claims before the Commission, issue preclusion is inapplicable.[28] *See Edmundson*, 4 F.3d at 189. The critical question is whether claim preclusion applies to those particular allegations. In other words, could plaintiff have countered Haverford's assertion before the Commission, i.e., that plaintiff's dismissal was based on just cause, by alleging that her dismissal was the result of discrimination and/or retaliation on the part of Haverford.

"To determine the preclusive effect of [a plaintiff's] prior state action [the court] must look to the law of the adjudicating state" regarding preclusion. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 357 (3d Cir. 1999); *McNasby v. Crown, Cork & Seal Co.*, 888 F.2d 270, 276 (3d Cir. 1989). The Civil Service Act, under which plaintiff contested her dismissal, provides in pertinent part:

> No officer or employe[e] of the Commonwealth shall discriminate against any person in recruitment,

28. Thus, plaintiff's argument that she did not raise the discrimination issue before the Commission is not dispositive for purposes of Haverford's motion. *See CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (finding that CoreStates' argument "that claim preclusion should not apply because the bankruptcy proceeding did not modify or adjudicate its rights under the Agreement . . . misapprehends the fundamental nature of the doctrine of claim preclusion, which applies whether or not the particular issue was actually raised or decided by the prior court"). Moreover, plaintiff's reliance on *Dici v. Commonwealth of Pa.*, 91 F.3d 542 (3d Cir. 1996), as support for her position is misplaced because *Dici* involved issue preclusion, not claim preclusion.

> examination, appointment, training, promotion, retention, or any other personnel action with respect to the classified service because of political or religious opinions or affiliations, because of labor union affiliations, or because of race, national origin, or other non-merit factors.

71 Pa. Cons. Stat. Ann. § 741.905a. Thus, claims of employment discrimination may be properly adjudicated before the Commission.

Furthermore, in reviewing a decision by the Commission, the Pennsylvania Commonwealth Court has the authority to determine whether the Commission's decision is "in accord with the law, whether the necessary findings of fact are supported by substantial evidence or whether constitutional rights have been violated." *See Bazargani*, 711 A.2d at 531 n.2. Therefore, it appears that on appeal from the actions of the Commission, the Commonwealth Court has the competence to adjudicate employment discrimination claims.[29]

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29. The court notes that the Third Circuit has made it clear that under Pennsylvania law, preclusion is inapplicable when the adjudicative body in the first action did not have jurisdiction over claims brought in the second action. *See McCarter v. Mitcham*, 883 F.2d 196, 199 (3d Cir. 1989). Indeed, in *McNasby v. Crown, Cork & Seal Co.*, 888 F.2d 270, 276 (3d Cir. 1989), the Third Circuit found that claim preclusion was not available to the defendants because the PHRC and the Commonwealth Court lacked original jurisdiction to hear the plaintiffs' Title VII claims. However, *McNasby* is distinguishable for two reasons. First, since the Third Circuit decided *McNasby*, the United States Supreme Court has explained in *Yellow* (Cont'd)



Indeed, an examination of the case law concerning appeals from Commission decisions demonstrates that the Commission and the Commonwealth Court regularly hear and review claims of employment discrimination in discharge cases. *See, e.g., Masneri v. State Civil Serv. Comm'n*, 712 A.2d 821 (Pa. Cmwlth. 1998) (affirming Commission's decision that employee was furloughed due to lack of work, as opposed to gender discrimination); *Williams v. Pennsylvania Dep't of Public Welfare, Bensalem Youth Dev. Ctr.*, 671 A.2d 292, 294 (Pa. Cmwlth.Ct. 1996) ("Where an appointing authority asserts that violation of its policies constitutes just cause for such action, a challenge to those policies on the basis that they discriminate against individuals protected by federal law is properly raised under Section 951(a) [of the Civil Service Act]. A discriminatory policy that violates federal law cannot serve as the basis of an employee's dismissal.").

Consequently, because the Commission can hear claims of employment discrimination and the Commonwealth Court has the competence to review those claims, plaintiff cannot credibly argue that she lacked the opportunity to raise her instant claims of discrimination and retaliation in the previous state court litigation. *See Edmundson*, 4 F.3d at 191 ("Because

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(Cont'd)

*Freight System, Inc. v. Donnelly*, 494 U.S. 820, 821 (1990), that state courts have concurrent jurisdiction with the federal courts to hear and adjudicate claims of discrimination under Title VII. Second, unlike the defendant in *McNasby*, here plaintiff has sued Haverford Hospital, an institution run by an agency having no existence outside of the Commonwealth. Thus, as a suit "against the Commonwealth," the Commonwealth Court would possess original jurisdiction.

the plaintiff could have but did not raise the First Amendment defense in the [unemployment] compensation case . . . he is precluded from asserting that ground in the present case."); *see also Duquesne Light Co. v. Pittsburgh Rys.*, 194 A.2d 319, 321 (Pa. 1963) (finding that "defense of illegality should have been raised in the first petition to open judgment" and that "res judicata doctrine [was] designed to prevent the very situation which would result if appellant's second petition were granted, namely, the injection of a new issue into the case after almost four years of litigation").[30]

Next, in determining whether claim preclusion applies, the court must compare the claims that have been asserted in the instant action with the claims that could have been asserted in the previous action. Under Pennsylvania law, to show that a prior judgment has preclusive effect on claims that may have been litigated in that previous action, the party asserting the defense of claim preclusion must demonstrate that the prior action and the instant action share an identity of: "(1) the thing sued on; (2) cause of action; (3) persons

30. In *Kelley v. TYK Refractories Co.*, 860 F.2d 1188 (3d Cir. 1988), the plaintiff brought suit in federal court pursuant to 42 U.S.C. § 1981. The defendant sought summary judgment on the grounds of issue preclusion based on state court-reviewed factual findings of the Unemployment Compensation Board. The Third Circuit, in a footnote, stated that "[b]ecause allegations of racial discrimination are not a necessary element of an unemployment compensation claim under Pennsylvania law, the doctrine of claim preclusion [was] not before [it]." *Id.* at 1192 n.7. In *Edmundson*, however, the Third Circuit distinguished *Kelley* by stating that exercise of First Amendment rights was a valid defense to discharge. 4 F.3d at 191 n.1. Likewise, as discussed above, here plaintiff could have asserted discrimination as a valid defense to her discharge.



and parties to the action; and (4) quality or capacity of the parties suing or sued." *See Gregory*, 843 F.2d at 116; *see also Edmundson*, 4 F.3d at 191-92 (citing *Stevenson v. Silverman*, 208 A.2d 786, 787-88 (Pa. 1965)).

Here, the "thing sued on" in both cases was plaintiff's termination from employment. *Cf. Gregory*, 843 F.2d at 116-17 (finding plaintiff's discharge gave rise to both federal and state actions). Moreover, both plaintiff and Haverford were parties to the prior litigation, in their same capacities, i.e., employer/employee. Plaintiff's argument, although framed in terms of issue preclusion, essentially focuses on the same cause of action element.

Identity of the cause of action element "is broadly defined in terms of the transaction out of which the claim arose." *See Bracy v. Commonwealth of Penn. Dep't of Public Welfare*, 1989 WL 11231, at *3 (E.D. Pa. Feb. 10, 1989) (citing *Gregory*, 843 F.2d at 117); *see also CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (taking "a broad view" in deciding whether two suits are based on the same cause of action" by "looking to whether there is an 'essential similarity of the underlying events giving rise to the various legal claims' ") (quoting *United States v. Athlone Indus.*, 746 F.2d 977, 984 (3d Cir. 1984)). Indeed, in *Gregory*, the focus of the court in determining whether there were identical causes of action was to "uncover the nub of the controversy." 843 F.2d at 118.

To determine whether causes of action are identical for purposes of claim preclusion, the court may consider, among other things, four criteria, namely whether: (1) the acts

complained of and the demand for relief are the same; (2) the theory of recovery is the same; (3) the witnesses and documents necessary at trial are the same; and (4) the material facts alleged are the same. *See O'Leary v. Liberty Mutual Insurance Co.*, 923 F.2d 1062, 1065 (3d Cir. 1991) (citing *Athlone Indus.*, 746 F.2d at 984). Here, these criteria would be substantially met had plaintiff availed herself of the opportunity to litigate her discrimination claims before the Commission.

Clearly, the act complained of (plaintiff's termination from employment) is the same in both actions. Further, had plaintiff pursued her discrimination and retaliation claims before the Commission and then on appeal before the Commonwealth Court, she would have been alleging the same facts, i.e., the disparate treatment of hospital psychiatrists with respect to discipline regarding patients having elevated Lithium levels and against those psychiatrists filing EEOC complaints and discrimination lawsuits, and the documentation and witnesses plaintiff would have presented would have been the same. Merely because plaintiff relies on different theories for recovery or seeks different recovery or relief is not dispositive. *See Gregory*, 843 F.2d at 118 ("Distinct causes of action do not arise merely because the motivations alleged in the two forums differ. Nor, as we have observed, is it critical that one is based on federal law and the other on state law. . . . It is not significant that the relief obtainable in the two forums varies to some degree."); *see also Brame v. Buckingham Township*, No. CIV.A. 1997 WL 288673, at *6 (E.D. Pa. May 23, 1997). Therefore, the court finds that plaintiff's claims of discrimination and retaliation, relating to her termination, are precluded.



*See Bell v. Supermarkets Gen'l Corp.*, No. CIV.A. 92-4558, 1993 WL 429011 (E.D. Pa. Oct. 20, 1993) (involving prior reviewed unemployment compensation case and finding that claim preclusion barred plaintiff's instant federal claims of discrimination and retaliation because plaintiff could have and should have raised and litigated those claims in state court), *aff'd sub nom.*, *Bell v. Pathmark*, 27 F.3d 555 (3d Cir. 1994) (table); *see also Bracy*, 1989 WL 11231, at *6 ("[Plaintiff] availed himself of the right to bring a claim before the Pa. CSC and the right to appeal that body's termination to the Commonwealth Court. He was not required to pursue his claim to judgment in the state judicial system. Once he has done so, however, this court is required to give that state judgment the same effect as would Pennsylvania, the rendering state.").

D. Plaintiff's Non-Promotion Claims[31]

1. "Discrimination by Non-Promotion" Claim

As with plaintiff's discrimination by termination claims, the burden-shifting analysis applies to plaintiff's contention that she was not selected for promotion to Psychiatric Supervisor because of her religion and national origin.

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31. In a footnote in its motion for summary judgment, Haverford states that because plaintiff's appeal regarding her non-promotion remains pending, the court could abstain from adjudicating it. *See* Def.'s Mot. at 38 n.27. Given the lack of record evidence regarding the status of this appeal, the court will not address this argument.

*Appendix B*

a. Plaintiff's prima facie case

Haverford again concedes for purposes of this motion that plaintiff could make out a prima facie case of discrimination with respect to her non-promotion claim.[32] Thus, Haverford must meet its burden of production by stating a legitimate, non-discriminatory reason for not selecting plaintiff for promotion.

b. Haverford's legitimate non-discriminatory reason

Given that plaintiff's prima facie case has been conceded for purposes of this motion, the burden of production shifts to Haverford to articulate a clear and reasonably specific legitimate, non-discriminatory reason for not promoting plaintiff to the vacant position. *See Burdine*, 450 U.S. at 252-55; *Fuentes*, 32 F.3d at 763; *Johnson*, 76 F. Supp.2d at 585 (quoting *Burdine*, 450 U.S. at 257). Haverford has articulated a reasonably specific legitimate, non-discriminatory reason for selecting Dr. Fernandes over plaintiff for the vacant position of Psychiatric Supervisor. Specifically, Haverford contends that Dr. Fernandes was selected because she was better qualified in that she "was energetic and self confident, displayed a comprehensive understanding of the hospital, described appropriate applications relevant to the position, had good knowledge of community resources, and seemed to have good conflict resolution skills." *See* Def.'s Mot. for Summ. J., at Ex. C, Def.'s Answer to Pl.'s Interr. No. 21, *see also id.* at 39. The court concludes that Haverford has met

32. It bears repeating that although Dr. Altenor contends in his affidavit that he was unaware of plaintiff's religious background, *see* Def.'s Mot. for Summ. J., Ex. D, ¶ 12, Haverford does not appear to argue that because plaintiff failed to inform it of her religious beliefs, she cannot meet her prima facie case.



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its burden of production by articulating a clear and reasonably specific reason for not promoting plaintiff. Thus, at this point, the presumption of discrimination drops from the case. *Fuentes*, 32 F.3d at 763.

c. Plaintiff's evidence of pretext

Because Haverford has articulated a clear and reasonably specific legitimate, non-discriminatory reason for not promoting plaintiff, to defeat summary judgment, plaintiff "must point to some evidence, direct or circumstantial, from which a reasonable finder of fact could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Brewer*, 72 F.3d at 331 (citing *Fuentes*).

Plaintiff has not met her burden. Indeed, in her response, plaintiff appears to have discarded her discrimination claim based on Haverford's failure to promote her. In simply claiming that a genuine issue of fact exists thereby precluding summary judgment, plaintiff does not even address, let alone put forth evidence demonstrating "implausibilities, inconsistencies, incoherencies, or contradictions" in Haverford's reasonably specific articulated reasons for not promoting her to the vacant Psychiatrist Supervisor position in November of 1994. *See* Pl.'s Resp. at 10-11. The bald allegations contained in plaintiff's complaint and affidavit are insufficient because " '[m]erely reciting that [national origin and religion were] the reason[s] for the decision does not make it so.' " *Valentin v. Crozer-Chester Med. Ctr.*, 986 F. Supp. 292, 301 (E.D. Pa. 1997) (quoting *Billet v. CIGNA Corp.*, 940 F.2d 812, 816 (3d Cir. 1991), *abrogated*

*on other grounds by, St. Mary's Honor Ctr.*, 509 U.S. at 517-18)). Therefore, summary judgment in favor of Haverford on plaintiff's non-promotion discrimination claim is warranted.

2. "Retaliation by Non-Promotion" Claim

In her amended complaint, plaintiff alleges that Haverford retaliated against her for filing disability discrimination charges with the EEOC and PHRC and otherwise complaining about Haverford's practices by refusing to promote her to positions to which she was entitled based on her seniority. *See* Am. Compl. ¶ 11(A)-(B). Haverford contends that it is entitled to judgment on this claim because plaintiff has failed to establish a prima facie case of unlawful retaliation with respect to her non-promotion.

a. Burden-shifting evidentiary framework

As stated above, the burden-shifting framework applies to retaliation claims as well. Haverford concedes for purposes of this motion that plaintiff can establish the first two elements of her prima facie case for retaliation, i.e., that she engaged in protected activity and that she suffered an adverse employment action. Haverford once again argues, however, that plaintiff cannot show a causal connection between her filing an EEOC charge in June of 1993 and the fact that she was not selected for the vacant position in November of 1994. Haverford further asserts that plaintiff's questioning the validity of the initial posting does not constitute protected activity.



Plaintiff does not appear to respond to Haverford's attack on her retaliation by non-promotion claim. To the extent plaintiff would try to show causation by pointing to the temporal proximity between the time she filed her first lawsuit and when she was informed that she had not been selected for promotion, plaintiff's attempt would fail because, as discussed above, plaintiff has not shown that Dr. Altenor, the individual making the promotion decision, knew when he made the decision not to promote plaintiff that plaintiff had filed suit nine days prior. Moreover, for the reasons stated above, plaintiff's previous protected activity, which occurred approximately seventeen months prior to the promotion decision, is too temporally remote to support an inference of retaliation. *Cf. Krouse*, 126 F.3d at 505. Thus, plaintiff has not established a prima facie case of retaliation with respect to her non-promotion claim.

Even if plaintiff had established a causal connection, the court finds that plaintiff cannot show that Haverford's articulated reason for not promoting plaintiff, i.e., that the panel, upon which Dr. Altenor relied, viewed Dr. Fernandes as the better candidate, is a pretext for retaliation. Simply put, plaintiff has produced no evidence of pretext. For example, plaintiff does not even allege, let alone submit evidence tending to prove, *inter alia*, that she was better qualified than Dr. Fernandes or that the panel was biased against Iranian Muslims. Without this type of or similar evidence, plaintiff cannot raise a genuine issue of fact that retaliatory intent had "a determinative effect" on Haverford's decision not to promote her. Therefore, Haverford is entitled to summary judgment on plaintiff's claim of retaliation by non-promotion as well.

*Appendix B*

IV. CONCLUSION

For the reasons discussed above and briefly summarized below, Haverford's motion for summary judgment will be granted. First, given the protections of the Eleventh Amendment and absent any waiver or consent by Pennsylvania or Congress, plaintiff may not pursue her PHRA claims in federal court. In addition, plaintiff has failed to raise a genuine issue of fact that Haverford's reason for terminating her employment is a pretext for discrimination or retaliation. Plaintiff has also failed to establish a prima facie case of retaliation relating to her termination nor has she shown that Haverford's reason for terminating her is a pretext for retaliation. Moreover, even if plaintiff had offered evidence showing that Haverford's reasons for discharging her were a pretext for discrimination and retaliation, plaintiff is barred by the doctrine of claim preclusion from pursuing her discrimination and retaliation claims based on her termination. Further, summary judgment is also warranted with respect to plaintiff's claim of discrimination relating to her non-promotion because plaintiff has failed to raise a genuine issue of fact that Haverford's reason for not promoting her was a pretext for discrimination or retaliation. Finally, plaintiff has failed to establish a prima facie case of retaliation relating to her non-promotion nor has she shown that Haverford's reason for not promoting her is a pretext for retaliation.

An appropriate order follows.



*Appendix B*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 97-7377

TAWOOS BAZARGANI,

Plaintiff,

v.

HAVERFORD STATE HOSPITAL,

Defendant.

ORDER

**AND NOW**, this 31st day of **March, 2000**, it is hereby **ORDERED** that:

1. Defendant's motion for summary judgment is **GRANTED** with respect to plaintiff's Title VII claims;

2. Plaintiff's claims brought pursuant to the Pennsylvania Human Relations Act are **DISMISSED without PREJUDICE**; and

3. **JUDGMENT** is **ENTERED** in favor of defendant and against plaintiff on plaintiff's Title VII claims.

The clerk shall mark this case closed.

**AND IT IS SO ORDERED.**

s/ Eduardo C. Robreno
**EDUARDO C. ROBRENO, J.**

## APPENDIX C — STATUTORY PROVISIONS INVOLVED

### Penn Consolidated Statutes Annotated
### 18 Pa.C.S.A.

### § 4904. Unsworn falsification to authorities

**(a) In general.** — A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

**(b) Statements "under penalty."** — A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

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*Appendix C*

### 18 U.S.C.A.

### § 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

* * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.